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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-674

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner,

v.

THOMAS W. GRIFFITH and
AMERICAN COMMERCIAL LINES, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI—AMERICAN COMMERCIAL LINES, INC.

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The petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered August 11, 1975, reversing the judgment of the United States District Court for the Western District of Pennsylvania entered on November 5, 1975, as amended November 21, 1974.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit is reported at 521 F.2d 31. The opinion of the United States District Court for the Western District of Pennsylvania is reported at 384 F.Supp. 230.

Question Presented

Whether the decision of the Court of Appeals is in accord with the prior case law and the provisions of the Longshoremen's and Harbor Workers' Compensation Act relating to the liabilities of a manufacturer that employs longshoremen to load its products into a barge in its possession.

Statement of the Case

This action was commenced by plaintiff to recover for injuries sustained while unloading a barge owned by American Commercial Lines, Inc., (American) and in the possession of Wheeling-Pittsburgh Steel Corporation (Wheeling-Pittsburgh), his employer.

On May 23, 1973, in response to an oral request from Wheeling-Pittsburgh, American delivered barge ACBL 2730 to Wheeling-Pittsburgh's Allenport dock (R. 22a).[1] Wheeling-Pittsburgh placed this barge within its fleet until it was ready to be loaded. Wheeling-Pittsburgh put lights on its fleet and, depending on its position in that fleet, would have put lights on ACBL 2730 (R. 22a, 23a).

ACBL 2730 remained with the fleet for an undetermined length of time. By the morning of May 26, 1973, however, it had been moved and secured to the river side of another barge then in position to be loaded. This movement was probably accomplished by a Wheeling-Pittsburgh employee using a rope and pulleys. If a towboat had been needed to assist in this move, Wheeling-Pittsburgh had M/V Monessen available for this purpose (R. 29a, 103a-105a).

On May 26, 1973, plaintiff—an employee of Wheeling-Pittsburgh—was a member of an eight man crew having the

[1] As in Wheeling-Pittsburgh's petition, references beginning with "R." are to the appendix filed in the Court of Appeals.

job of loading steel products produced by Wheeling-Pittsburgh into barges. Of these eight men, one, Joseph Armstrong, was an experienced riverman. Plaintiff and one other man had done this type of work on a few occasions in the past. The other five members of the crew were totally inexperienced (R. 92a).

At about 11:05 a.m. the crew to which plaintiff was assigned began to load ACBL 2730. At this time the foreman, Joseph Allfree, became aware of the fact the barge covers were difficult to move. He nevertheless allowed the work to continue, and the necessary covers were opened (R. 44a, 38a).

At approximately 2:00 p.m. Mr. Allfree directed the crew to stop loading the barge and to replace the previously opened covers to the closed position. Mr. Allfree then returned to his office (R. 39a).

Plaintiff and Joseph Armstrong undertook to close a stuck cover with the assistance of a crane operated by a third Wheeling-Pittsburgh employee. They had attached cables to the stuck cover and moved to an adjacent cover when the crane operator lifted the cables straight up. This caused the cover on which they were standing to move, precipitating both of them to the bottom of the barge (R. 87a-88a, 111a-113a).

In August of 1973 plaintiff filed the present action against Wheeling-Pittsburgh and American. Each defendant denied liability to plaintiff and cross-claimed against the other for indemnity or contribution. After all parties had engaged in discovery, American moved for summary judgment on plaintiff's claim against it and on its crossclaim against Wheeling-Pittsburgh. Wheeling-Pittsburgh moved for summary judgment on the claims made against it by both plaintiff and American. No motion was made with respect to Wheeling-Pittsburgh's crossclaim against American.

On November 5, 1974, the District Court entered an order dismissing all claims against Wheeling-Pittsburgh. In the accompanying opinion, the court found, in accord with petitioner's own designation of itself, that Wheeling-Pittsburgh was owner *pro hac vice* of ACBL 2730 at the time of the accident.[2]

On November 21, 1974, the District Court amended its order of November 5, 1974, to certify the dismissal of the claims against Wheeling-Pittsburgh as a final judgment under Fed. R. Civ. P. 54 (b). Plaintiff and American jointly appealed from that order.

The Court of Appeals reversed the District Court, holding that Wheeling-Pittsburgh could be found liable to both plaintiff and American for negligence chargeable to it in its capacity as owner *pro hac vice*. Wheeling-Pittsburgh then filed its petition for certiorari asserting, for the first time, that it cannot properly be designated an owner *pro hac vice*.

ARGUMENT

The decision of the Court of Appeals is in accord with the prior case law and the provisions of the Longshoremen's and Harbor Workers' Compensation Act relating to the liabilities of a manufacturer that employs longshoremen to load its products into a barge in its possession.

I. Petitioner's contention that the Court of Appeals misconstrued the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act relating to plaintiff's claim does not raise an issue warranting review by this Court.

Petitioner acknowledges that the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act

[2] Wheeling-Pittsburgh so identified itself on page 14 of its brief in the District Court.

(LSHWCA) permit a longshoreman employed by the vessel to sue his employer for injuries caused by negligence other than that of persons providing stevedoring services. (Wheeling-Pittsburgh's petition at 17-18.) It is clear from both the language of the statute and the legislative history that this is correct. 35 U.S.C. §905 reads, in pertinent part:

> "(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. *If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel* ..." (Emphasis added.)

The purpose behind the emphasized provision is explained in the report of the House Committee on Education and Labor as follows:

> "The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or ship builder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the vessel is the employer, the Supreme Court, in *Reed v. S.S. Yaka*, 373 U.S. 410 (1963) and *Jackson v. Lykes Bros. Steamship Co.*, 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. *The Committee believes that the rights of an injured longshoreman or ship builder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor.* Accordingly, the bill provides in the case of a longshoreman who is employed directly by the vessel there will be no action for damages if the injury was caused by the negligence of persons engaged in performing longshoring services. Similar provisions are

> applicable to ship building or repair employees employed directly by the vessel. *The Committee's intent is that the same principles should apply in determining liability of the vessel which employs its own longshoremen or ship builders or repairmen as apply when an independent contractor employs such persons.*" H.R.Rep. No. 92-1441, 92d Cong. 2d Sess. ____ (1972), U.S. Code Cong. & Admin. News, p. 4708 (emphasis added, footnotes omitted).

Thus, it is apparent a longshoreman who was employed by the vessel on which he was injured is precluded from suing his employer only "if the injury was caused by the negligence of persons engaged in providing stevedoring services." The longshoreman is otherwise free to "bring an action against such vessel as a third party." To deny him such an action would make his rights depend on whether he was employed by the vessel or by an independent contractor; exactly the result Congress sought to avoid.

In the same section of the amending statute that added § 905 (b) to LSHWCA, Congress enacted the definition of "vessel" now found in 33 U.S.C. § 902 (21). Act of Oct. 27, 1972, Pub. L. No. 92-576, § 18, 86 Stat. 1263. That definition states:

> "The term 'vessel' means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and the said vessel's owner, *owner pro hac vice*, agent, operator, charter or bare boat charterer, master, officer or crew member." (Emphasis added.)

Prior to the filing of its petition for certiorari Wheeling-Pittsburgh consistently conceded it could be found to have been owner *pro hac vice* of the barge on which plaintiff was injured. 521 F.2d at 39-40. This question should not, therefore, form a basis for granting certiorari. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147n. 2(1970).

In any event, Wheeling-Pittsburgh *was* owner *pro hac vice* as that term has been understood by the courts and Congress. In

Blair v. United States Steel Corp., 444 F.2d 1890 (3d Cir. 1971), *cert. denied* 404 U.S. 1018 (1972), the Third Circuit held, on facts virtually identical to those of the present case, that a steel company having possession of a barge for the purpose of loading it with its own products could be found to be owner *pro hac vice*. Similarly, in *Eskine v. United Barge Co.*, 484 F.2d 1194 (5th Cir. 1973), the Fifth Circuit held a salt mining company (Cargill) was correctly found to be owner *pro hac vice* of a barge it was loading with its product, explaining:

> "It [the barge] was in the exclusive control of Cargill while being loaded. When loaded, it would have been moved from the dock by Cargill. The relationship was, or was analogous to, that existing under a bareboat charter. It is not clear from the record as to what the arrangement was between the barge owners and Cargill but it is clear that there was an arrangement existing under a contract, express or implied. Although the voyage of the barge on which Eskine was injured was short in both time and space, there was a movement on navigable waters to the dock, a loading at the dock and an intended movement from the dock with Cargill having, at all times, the complete and exclusive control of the barge. This being so, Cargill was the owner pro hac vice of the barge and as such liable for damages for injuries resulting from unseaworthiness." *Id.* at 1196.

No conflicting decisions from other courts of appeals have been discovered.

Contrary to petitioner's assertion, the Third Circuit does not equate owner *pro hac vice* with a simple possessor. This was demonstrated in *Rao v. Hillman Barge and Construction Co.*, 467 F.2d 1276 (3d Cir. 1972), where the court distinguished *Blair* and held a company having possession of a barge solely to repair it could not be found owner *pro hac vice*. In that opinion the circuit court also cited with approval *Miller v. Union Barge Line Corp.*, 299 F.Supp. 718 (W.D.Pa. 1969), which had similarly held that a stevedoring contractor could

not be found owner *pro hac vice*. 467 F.2d at 1277. The Third Circuit's decision in the present case will not, therefore, impose liability on the stevedoring contractors and shipbuilders and repairers the 1972 amendments were intended to protect. Possible liability rests only on manufacturers like Wheeling-Pittsburgh that have taken possession of a barge to load it with its own products.

The Court of Appeals decision thus gave perfect implementation to the intent of Congress. As noted above, the entities against whom an action will lie are enumerated in the definition of "vessel." In its section-by-section description of the amendments, the House Education and Labor Committee Report explained:

> "Vessel would be defined as any vessel upon which or in connection with which any person entitled to benefits suffers injury and including the vessel owner and others responsible for the operation of the vessel." H.R. Rep. No. 92-1141, 92d Cong. 2d Sess. ____ (1972), U.S. Code Cong. & Admin, News, p. 4719.

In the present case, Wheeling-Pittsburgh was responsible for the operation of ACBL 2730 at the time of plaintiff's accident. While a stevedoring company cannot refuse to load a barge without losing business, Wheeling-Pittsburgh was under no such compulsion. Its only concern was to see its products were given transport. It was free to reject any barge it discovered was unsafe and, indeed, had established a procedure for doing this (R. 127a-28a). Having freely decided to use ACBL 2730 to carry its goods and to expose plaintiff to the risks involved in loading it, Wheeling-Pittsburgh cannot deny responsibility for this operation. Therefore, if plaintiff was injured by any negligence chargeable to Wheeling-Pittsburgh (other than that of persons providing stevedoring services), both the language and policy of the 1972 LSHWCA amendments require he be permitted to maintain his action against Wheeling-Pittsburgh.

II. Petitioner's contention that the Court of Appeals misconstrued the prior case law and the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act relating to American Commercial Line's contribution claim against petitioner raises no question warranting review by this Court.

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court held the decision in *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952), does not bar contribution in a noncollision maritime case where the tortfeasor from whom contribution is sought is not statutorily immune from liability to the injured party. 417 U.S. at 109-10. For the reasons set forth above, LSHWCA does not preclude plaintiff's negligence action against Wheeling-Pittsburgh *qua* owner *pro hac vice*. Thus, unless a jury found Wheeling-Pittsburgh's only negligence was that of persons providing stevedoring services, this case is legally indistinguishable from *Cooper* and American would be entitled to contribution.

None of the cases cited in Wheeling-Pittsburgh's petition considered the narrow exception to the general rule of employer nonliability presented in this case. None of those cases can, therefore, be considered to be in conflict with the Court of Appeals' decision in this case.

Finally, petitioner asserts the Court of Appeals' decision is in "direct conflict" with three decisions of the Fifth Circuit. (Petition at 27-28.) However, all those cases involved injuries occurring on fixed offshore platforms rather than vessels. The decisions were based on the Fifth Circuit's holdings that the right of indemnification recognized in *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), did not exist in a non-vessel case,[3] and

> " '. . . that the Act's exclusive liability provision effectively abrogates any independent tort liability of the

[3] *E.g.*, White v. Texas Eastern Transmission Corp. 512 F.2d 486, 488 n.5 (5th Cir. 1975).

employer to its employees, *thereby eliminating any basis which may have existed for indemnification on a tort theory.*' " *White v. Texas Eastern Transmission Corp.*, 512 F.2d 486, 489 (5th Cir. 1975) (emphasis by the court).

These cases are not, therefore, in conflict with the Third Circuit's decision in the present case. Further, the above quoted passage and the Fifth Circuit's handling of *Cooper* indicate it would agree with the Third Circuit that a right to contribution exists where, as here, the Act permits the employee to maintain an action against his employer for negligence chargeable to it in its capacity as "vessel."

Conclusion

In interpreting the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, the Court of Appeals correctly perceived and implemented a narrow exception Congress made to the general rule that a stevedoring employee cannot maintain a negligence action against his employer. The issues presented are thus not of sufficient moment to warrant granting a writ of certiorari. It is respectfully submitted Wheeling-Pittsburgh's petition should, therefore, be denied.

Respectfully submitted,

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